No. 83-18

IN THE

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
*Petitioner,*

v.

GREENMOSS BUILDERS, INC.,
*Respondent.*

On Writ of Certiorari to the
Supreme Court of the State of Vermont

## JOINT APPENDIX

GORDON LEE GARRETT, JR.
HANSELL & POST
3300 FIRST ATLANTA TOWER
Atlanta, Georgia 30383
(404) 581-8000

*Counsel for Petitioner*

THOMAS F. HEILMANN
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*Counsel for Respondent*

Petition for Writ of Certiorari Filed July 8, 1983
Certiorari Granted November 7, 1983

# TABLE OF CONTENTS

**STATE OF VERMONT**
**WASHINGTON SUPERIOR COURT**

| | | |
|---|---|---|
| Greenmoss Builders, Inc., | : | |
| | : | |
| v. | : | Docket No. S326-77WnC |
| | : | |
| Dun & Bradstreet, Inc. | : | |

Relevant Docket Entries

| Filing or Order Date | |
|---|---|
| October 21, 1977 | Summons, Complaint & Return of Service filed. |
| November 21, 1977 | Entry of Appearance; Answer & First Defense-Sixth Defense filed by Peter Monte. |
| January 23, 1980 | Motion to Dismiss as to the individual plaintiff, John Flanagan is GRANTED. |
| April 8, 1980 | Defendant's Request to Charge Jury and Memo of Law Concerning Existence & Nature of Qualified Privilege filed by Attorney Monte. |
| April 9, 1980 | Plaintiff's Request to Charge filed. |

April 9, 1980 — Plaintiff's Verdict

In this cause the jury on their oath say the Defendant is liable in manner and form as the Plaintiff has alleged in its complaint; They therefore find for the Plaintiff to recover of the Defendant $350,000.00 dollars, damages.

If punitive damages are allowed and represent any portion of the total damages set forth above, please indicate below the dollar amount allowed for punitive damages,

$300,000.00

Signed,

Vivian Bryan, Foreperson

April 22, 1980 — Judgment filed and copies mailed to counsel.

April 30, 1980 — Post-Trial Motions Under Rules 50 and 59 & Defendant's Memorandum in Support of Post-Trial Motions Under Rules 50 and 59 filed by Attorney Monte.

May 12, 1980 — Hearing on all post-judgment motions; Hayes, J.; Hall, R.; Attorney Monte requested transcript of hearing per Reporter Hall.

| | |
|---|---|
| October 20, 1980 | Order filed and copies mailed to counsel;<br>It is hereby ORDERED and ADJUDGED:<br>That all motions of the Defendant for judgment notwithstanding the verdict are DENIED;<br>That Defendant's motion for a new trial on all issues is GRANTED. |
| October 29, 1980 | Memorandum of Law & Petition for Permission to Appeal filed by Attorney Heilmann. |
| April 29, 1981 | Order filed and copies mailed to counsel 4/29/81;<br>It is hereby ORDERED and ADJUDGED that the Plaintiff's Motion for Permission to Appeal and the alternative requests of the Defendant are GRANTED. |

# SUPREME COURT OF THE STATE OF VERMONT

(Title omitted in printing)

Relevant Docket Entries

| Filing or Order Date | |
|---|---|
| April 15, 1983 | Order and Opinion of the Supreme Court of the State of Vermont dated April 15, 1983 |

STATE OF VERMONT
WASHINGTON COUNTY, SS.

| | |
|---|---|
| GREENMOSS BUILDERS, INC. and JOHN FLANAGAN | VERMONT SUPERIOR COURT |
| vs. | WASHINGTON COUNTY |
| DUN & BRADSTREET, INC. | Civil Action Docket No. ____ |

## COMPLAINT

1. Plaintiff Greenmoss Builders, Inc., is a corporation organized and existing under the Laws of the State of Vermont with its principal place of business in Waitsfield, Vermont.

2. Plaintiff John Flanagan is a citizen and resident of Vermont residing in Waitsfield, Vermont. In 1971 plaintiff Flanagan created Greenmoss Builders and did business under said style until 1973 when Greenmoss Builders, Inc., was incorporated under the laws of the State of Vermont. Plaintiff Flanagan is the President, principal shareholder and prime moving force of said corporation. The members of the public in the community wherein the plaintiffs transact their business identify plaintiff Flanagan with Greenmoss Builders and acknowledge that plaintiff Flanagan as owner of said corporation, has a proprietory interest therein.

3. Defendant Dun and Bradstreet, Inc., is, upon information and belief, a corporation organized and existing under the Laws of the State of Delaware with its

principal place of business in New York. Among the business activities of defendant Dun & Bradstreet is the collection and dissemination of economic information concerning various business concerns to its subscribers.

4. On July 26, 1976, Dun & Bradstreet carelessly and negligently and with reckless disregard for the truth, informed its subscribers by means of a Special Notice, that Greenmoss Builders, Inc., had filed a voluntary petition in bankruptcy under Chapter 4 of the Bankruptcy Act. Defendant Dun & Bradstreet undertook no investigation to determine the truth of the information circulated by it which information was untrue at the time of circulation and remains untrue at present and which untruth, defendant Dun & Bradstreet would have discovered in the event it undertook any investigation of the matter.

5. In addition to the matters complained of in the preceding paragraph, by special notice dated July 26, 1976, defendant Dun & Bradstreet grossly misrepresented the assets and liabilities of the corporation and said misrepresentation was done in a careless and negligent manner with reckless disregard for the truth. Defendant Dun & Bradstreet undertook no investigation or examination of the truth of the matters asserted by it and had such investigation been undertaken the true state of the plaintiff's assets and business affairs would have been revealed.

6. As a direct and proximate result of the acts and omissions of the defendant as aforesaid, and as a further and direct and proximate result of its reckless disregard for the truth, plaintiff Greenmoss Builders, Inc., and plaintiff John Flanagan have suffered damage, embarrassment, humiliation, injury and loss to

their business reputations and status and standing in the community.

7. The false and defamatory statements referrred to in Paragraphs #4 and #5 were published and circulated by defendant Dun & Bradstreet to members of the public and since they affect the plaintiffs in their trade or business, said erroneous statements constitute defamation and libel per se.

WHEREFORE, each plaintiff demands the sum of Seven Thousand Five Hundred ($7,500.00) Dollars each in compensatory damages and each plaintiff demands the sum of Fifteen Thousand ($15,000.00) Dollars each in punitive or exemplary damages from defendant.

Pursuant to Rule 38 V.R.C.P. plaintiffs Greenmoss Builders Inc., and John Flanagan herein demand a trial by jury as of all issues triable in this cause.

Dated at City of Barre, County of Washington and State of Vermont this 13th day of October, 1977.

By: _____
THOMAS F. HEILMANN, ESQ.

| | |
|---|---|
| STATE OF VERMONT<br>WASHINGTON COUNTY, SS | WASHINGTON SUPERIOR COURT<br>Docket No.: S-326-77Wnc |
| GREENMOSS BUILDERS, INC. and JOHN FLANAGAN<br><br>vs.<br><br>DUN & BRADSTREET, INC. | ANSWER |

NOW COMES Dun & Bradstreet, Inc., by and through its attorneys Young & Monte, and for its answer to plantiffs' complaint says as follows:

## FIRST DEFENSE

1. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 1 of plaintiffs' complaint and calls upon plaintiffs to prove the same.

2. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 2 of plaintiffs' complaint and calls upon plaintiffs to prove the same.

3. Defendant admits the allegations of Paragraph 3 of plaintiffs' complaint.

4. Defendant denies each and every allegation contained in Paragraph 4 of plaintiffs' complaint.

5. Defendant denies each and every allegation contained in Paragraph 5 of plaintiffs' complaint.

6. Defendant denies each and every allegation contained in Paragraph 6 of plaintiffs' complaint.

7. Defendant denies each and every allegation contained in Paragraph 7 of plaintiffs' complaint.

## SECOND DEFENSE

8. This court lacks jurisdiction over the subject matter of this cause and lacks jurisdiction over the person of the defendant.

## THIRD DEFENSE

9. The complaint fails to state a claim upon which the plaintiff, John Flanagan, can be granted relief against the defendant.

## FOURTH DEFENSE

10. The complaint fails to state a claim upon which the plaintiff, Greenmoss Builders, Inc., can be granted relief against the defendant.

## FIFTH DEFENSE

11. Any allegedly defamatory statement which the plaintiffs claim was made by the defendant and is the cause of any alleged injury to the plaintiffs was made by the defendant in good faith in the course of its business as a commercial credit rating and reporting agency, and any such allegedly defamatory statement was made by the defendant only in response to a legitimate request for credit information made of the defendant by one of its subscribers. Any such alleged defamatory statement is therefore the subject of a

privelege, which privelege the defendant claims the benefit of.

SIXTH DEFENSE

12. All statements allegedly made by defendant pertaining to plaintiffs were true.

WHEREFORE, defendant prays:

1. The plaintiffs' complaint be dismissed.

2. That plaintiffs be ordered, pursuant to Rule 9(b), to plead with more particularity the statements alleged to have been made by defendant which were defamatory.

3. That judgment be entered for the defendant.

4. That defendant be awarded its costs, including a reasonable attorney fee.

5. For such other and further relief as is just.

DATED at Northfield, County of Washington and State of Vermont this 18th day of November, 1977.

DUN & BRADSTREET, INC.
By Its Attorneys
YOUNG & MONTE

By _____
Peter J. Monte, Esquire

STATE OF VERMONT
WASHINGTON SUPERIOR COURT
(Title omitted in printing)

**DUN & BRADSTREET, INC.** **SPECIAL NOTICE**

D-U-N-S

No. 06-675-5349 Jul. 26, 1976 Rating NQ
Greenmoss Builders Inc. Formerly

Building Contractor EE2

Box 517 Started 1971
RTE #100 SIC Nos.
Waitsfield, VT 05673 15 22 15 42 15 31
Tel. 802 496-3124

PETITION UNDER NATIONAL BANKRUPTCY ACT

Voluntary Petition In Bankruptcy Filed Under Chapter IV

Date of Filing: July 1, 1976 Case # 76-201

City & State Filed:
Burlington, VT

**Plaintiff's 2**

Filed By: Richard Brock

LIABILITIES:
Total: $ 37,729

ASSETS:
Total: 26,835

Attorney: Richard Brock, Box 725, Montpelier, VT
Referee: Charles J. Marro, Merchants Row, Rutland, VT

07-28(76 /34 ) 0056/02 6 092

**This report is submitted only to J. Flanagan for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within 7 days.**

STATE OF VERMONT
WASHINGTON SUPERIOR COURT
(Title omitted in printing)

**DUN & BRADSTREET, INC.** **SPECIAL NOTICE**

D-U-N-S

No. 06-675-5349 Aug. 3, 1976 Rating —
Greenmoss Builders
Inc.

Building Contractor Started 1971

Box 357
Rte. #100 SIC Nos.
Waitsfield, VT 05673 15 22 15 42 15 31
Tel. 802 496-2561

**Plaintiff's 3**

CORRECTION CORRECTION CORRECTION

Any report to the effect that this corporation filed a voluntary petition in bankruptcy on July 1, 1976 under Chapter IV, file number 76-201 is erroneous and should be disregarded. The facts are that the bankruptcy was filed individually by an employee of this corporation. Greenmoss Builders Inc. continues operations as previously reported.
08-03(13 /29 )0176/06 41501 6 092

This report is submitted only to _____ for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within ___ days.

STATE OF VERMONT
WASHINGTON SUPERIOR COURT
(Title omitted in printing)
EXCERPTS FROM INSTRUCTIONS TO JURY

* * *

**[Tr. 484]** Now in this case I'm going to discuss with you the defamation aspects of it and the damage questions that may be related to it. The Plaintiff, as you know, Greenmoss Builders, Inc. has filed suit seeking compensatory and punitive damages on account of an alleged libel and defamation in the form of a Report **[Tr. 485]** issued by Dun & Bradstreet on July 26, 1976 in which it was erroneously reported that the Plaintiff had filed for bankruptcy. A libel is a false and defamatory statement negligently or recklessly published of and concerning the Plaintiff which tends to injure its reputation in the eyes of a substantial, respectable group, even though they are a minority of the total community, or of the Plaintiff's associates. A corporation is deemed a person under our law, and like a person, a corporation may be the subject of a libel. The Defendant in this case has conceded that the report of Plaintiff's bankruptcy was false and erroneous; that the Report was published to others by the Defendant is also uncontested. Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous per se. This means that the Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed. In the present case, I instruct you that the Defendant's Erroneous Report of the Plaintiff's bankruptcy constitutes libel as a matter of law unless you find that the Defendant was privileged to make that Report and publish

it to subscribers. Under the law, a commercial credit rating agency enjoys a qualified privilege in making reports to [Tr. 486] its subscribers. This means that a commercial credit rating agency cannot be held accountable for erroneous statements which are merely negligent. This is because commercial rating agencies are deemed to serve a legitimate business need which might not be met in the absence of the privilege. The Defendant has the burden of proving that it is a commercial credit rating agency, and I don't think there's any dispute about that in this case. If you determine that the Defendant is a commercial credit rating agency, the qualified privilege will apply; however, this is but a qualified privilege. If a commercial credit rating agency publishes an Erroneous Report to customers other than those who had recently requested credit information regarding the subject of a report, the agency has abused the privilege and may be held liable. In addition, if an Erroneous Credit Report is maliciously or recklessly made by a commercial rating agency, the agency is not entitled to the protection of that privilege. So in terms of the case before you, if you determine that the Defendant is ordinarily covered by the qualified privilege you must then determine whether that privilege has been abused, either by excessive publication to customers who have not requested credit information regarding the Plaintiff, or by malicious or reckless publication of the report. The Plaintiff has the burden of proving [Tr. 487] that the privilege has been destroyed. The conduct which would destroy the qualified privileges of a commercial credit agency must be more than mere negligence or want of sound judgment. It must show malice or lack of good faith on the part of the Defendant. If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that

Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it.

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be [Tr. 488] awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

Now a word or two about punitive damages. If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed. Punitive damages are designed to punish the offender and serve as [Tr. 489] an example to others. Whether or not to award such damages and to the amount thereof are matters confided solely to you for decision. In considering whether Defendant acted with actual malice so as to support an award of punitive damages, you may consider the conduct of the Defendant both before and after the publication of the Erroneous Report. In considering whether or not to award punitive damages, you may take into account whether Defendant took any steps to mitigate or reduce the injury to the Plaintiff. If you find the Defendant attempted to mitigate damages, you must lessen your award of damages to the extent that you believe appropriate under the circumstances.

Now in defamation actions, the law requires that you consider whether the Defendant has taken any steps to mitigate damages. Mitigation of damages is action taken by the Defendant to lessen the extent or severity of the injuries sustained by the Plaintiff because of Defendant's conduct. If you find that the Defendant took steps to alleviate damages or lessen the extent or severity of Plaintiff's damages, then you must take this mitigating conduct of the Defendant into account in determining the amount of damages and you must lessen your award as I've indicated to the extent that you believe is appropriate in all the circumstances.

**[Tr. 490]** Now ordinarily in a civil case one is not allowed to bring before the the jury the wealth of the Defendant or even to make any suggestions as to the wealth of the Defendant. And in considering whether or not Defendant is liable, you may not take into account Defendant's wealth. In considering what compensatory damages must be, if you reach that question, you may not take into account Defendant's wealth, but if you feel that there has been such outrageous conduct as would warrant punitive damages, then and only then may you take into consideration the wealth of the Defendant.

* * *

STATE OF VERMONT
WASHINGTON COUNTY, SS.

| | | |
|---|---|---|
| GREENMOSS BUILDERS, INC. | ) | WASHINGTON |
| | ) | SUPERIOR |
| vs | ) | COURT |
| | ) | Docket No. S- |
| DUN & BRADSTREET, INC. | ) | 326-77Wnc |

## JUDGMENT

This action came on for trial before the Court and a jury, Thomas L. Hayes presiding, and the issues having been duly tried and the jury on April 10, 1980, having rendered a verdict for the plaintiff to recover of the defendant damages in the amount of $350,000.00,

It is ORDERED and ADJUDGED that the plaintiff recover of the defendant the sum of $350,000.00 and its costs of action.

Dated at Montpelier, Vermont this 21st day of April, 1980.

Thomas L. Hayes
Hon. Thomas L. Hayes

Willis C. Bragg
Hon. Willis C. Bragg

Patricia B. Jensen
Hon. Patricia B. Jensen

STATE OF VERMONT
WASHINGTON COUNTY ss.

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|---|---|
| GREENMOSS BUILDERS | SUPERIOR COURT WASHINGTON COUNTY |
| V | |
| DUN & BRADSTREET | DOCKET NO. S326-77WnC |

## ORDER

The above-entitled cause came on for hearing before the Washington Superior Court on defendant's Motion for: Judgment for the defendant notwithstanding the verdict; for judgment on the issue of punitive damages notwithstanding the verdict; for judgment on the issue of a compensatory damages notwithstanding the verdict; and for a new trial of all issues in the above-captioned matter.

The Court has reviewed the instructions given the jury in this cause, and memoranda submitted, and has considered the evidence of record, the verdict rendered by the jury and the applicable law.

We are persuaded that the evidence is sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages. Therefore, all motions for judgment notwithstanding the verdict must be denied.

The more troublesome question is whether defendant should prevail on its motion for a new trial.

The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language

in the charge may have misled the jury to believe that damages were presumed in some amount in the case.

The United States Supreme Court held in *Gertz v. Robert Welch*, 418, U.S. 324:

> "The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

In view of the foregoing, it is hereby ORDERED and ADJUDGED:

1. That all motions of the Defendant for judgment notwithstanding the verdict are DENIED.

2. That Defendant's motion for a new trial on all issues is GRANTED.

Dated at Montpelier, County of Washington, this 19th day of October 1980.

Thomas L. Hayes
Superior Judge

Willis C. Bragg
Assistant Judge

Patricia B. Jensen
Assistant Judge

STATE OF VERMONT
WASHINGTON COUNTY, SS.

| | | |
|---|---|---|
| GREENMOSS BUILDERS, INC. | ) | WASHINGTON SUPERIOR COURT DOCKET NO. S326-77 WnC |
| V. | ) | |
| DUN & BRADSTREET | ) | |

## ORDER

The above-entitled cause came on before the Washington Superior Court on Plaintiff's Petition for Permission to Appeal, which petition was opposed by the Defendant. However, the Defendant requested that, if this Court grants permission for an interlocutory appeal, that said appeal include certain questions specified by the Defendant.

The Court finds, after considering the petition and the alternative requests made by the Defendant, that there exist controlling questions of law as to which there is substantial ground for difference of opinion concerning the Court's October 19, 1980 Order granting Defendant's motion for a new trial on all issues. The Court also finds that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. Accordingly, it is hereby ordered and adjudged that the Plaintiff's Motion for Permission to Appeal and the alternative requests of the Defendant are granted to the extent set forth below. The Clerk shall proceed as provided in Rules 3e and 5b (3) of the Vermont Rules of Appellate Procedure.

The controlling questions of law are as follows:

1. Did the Court err in granting Defendant's motion for a new trial on all issues?

2. If the answer to the previous question is in the affirmative, should the Court have entered judgment on the verdict?

3. If the answer to Question No. 1 is in the affirmative, should the Court have ordered a new trial on:

a) damages only?;

b) compensatory damages only?;

c) punitive damages only?

4. Did the Court err in denying all motions of the Defendant for judgment notwithstanding the verdict?

5. If the answer to the previous question is in the affirmative, should the Court have:

a) granted Defendant's Motion to enter judgment for the Defendant on the issue of punitive damages, notwithstanding the verdict?;

b) granted the motion of the Defendant for judgment on the issue of compensatory damages, notwithstanding the verdict?;

c) granted judgment for the Defendant on all issues?

Dated this 26th day of April, 1981.

Thomas L. Hayes
Superior Judge

Willis C. Bragg
Assistant Judge

Patricia B. Jensen
Assistant Judge

**SUPREME COURT OF THE STATE OF VERMONT**

ENTRY ORDER

SUPREME COURT DOCKET NO. 173-81
NOVEMBER TERM, 1982

| | APPEALED FROM: |
|---|---|
| Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc. | Washington Superior Court<br>DOCKET NO. S326-77WnC |

In the above entitled cause the Clerk will enter:

*Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.*

FOR THE COURT:

William C. Hill
WILLIAM C. HILL,
Associate Justice

Dissenting:

Concurring:

Albert W. Barney
ALBERT W. BARNEY,
Chief Justice

Franklin S. Billings, Jr.
FRANKLIN S. BILLINGS, JR.,
Associate Justice

Wynn Underwood
WYNN UNDERWOOD,
Associate Justice

Louis P. Peck
LOUIS P. PECK,
Associate Justice

**No. 173-81**

Greenmoss Builders, Inc. Supreme Court

v. On Appeal from Washington Superior Court

Dun & Bradstreet, Inc. November Term, 1982

Thomas L. Hayes, J.
Villa & Heilmann, Burlington, for plaintiff-appellant
Young & Monte, Northfield, for defendant-appellee

PRESENT: Barney, C.J., Billings, Hill, Underwood and Peck, JJ.

HILL, J. Plaintiff, a residential and commercial building contractor, brought this defamation action against defendant as a result of an erroneous credit report issued to defendant's subscribers (plaintiff's creditors). The credit report alleged that plaintiff had filed a voluntary petition in bankruptcy and, in addition, grossly misrepresented plaintiff's assets and liabilities. The false nature of the report's allegations has never been disputed.

In its complaint, plaintiff asserted that the consequences of defendant's report, which it insisted was published with reckless disregard for truth and accuracy, were a damaged business reputation, loss of company profits, and loss of money expended to correct the error. In response, defendant claimed both a constitutional and common law qualified privilege against defamation actions, and on that basis contended that since its report was published in good faith, it could not be held liable.

After a trial by jury, a verdict was returned in favor of plaintiff for $50,000 in compensatory or actual damages, and $300,000 in punitive damages. Thereafter, defendant filed timely motions for judgment notwithstanding the verdict, V.R.C.P. 50, and for new trial, V.R.C.P. 59, on the issues of liability and damages. The trial court, persuaded that the evidence was sufficient as a matter of law to create issues of fact for the jury as to both liability and damages, denied defendant's motions for judgment notwithstanding the verdict. Upon reviewing its jury instructions, however, the trial court concluded that it had incorrectly charged those standards of liability enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and granted defendant's motions for new trial on all issues.

This action is before us pursuant to an Interlocutory Order by the Washington Superior Court, V.R.A.P. 5(b)(1), certifying five questions of law for our resolution. (1) Did the trial court err in granting defendant's motion for a new trial on all issues? (2) If the answer to the first question is in the affirmative, should the court have entered judgment on the verdict? (3) If the answer to the first question is in the affirmative, should the court have ordered a new trial on: (a) damages only? (b) compensatory damages only? (c) punitive damages only? (4) Did the court err in denying all motions of the defendant for judgment notwithstanding the verdict? (5) If the answer to the fourth question is in the affirmative, should the court have: (a) granted defendant's motion to enter judgment for the defendant on the issue of punitive damages, notwithstanding the verdict? (b) granted the motion of the defendant for judgment on the issue of compensatory damages, notwithstanding the verdict? (c) granted judgment for the defendant on all issues? In light of

our disposition of the first four questions, we need not address the fifth question.

We begin with a review of the record. Defendant operates a business in which factual and financial reports about individual business enterprises are issued exclusively to subscribers of defendant's service. These subscribers, usually creditors of the reported enterprises, may contract for "continuous service reports" which enable them to receive all report updates about a particular business over a year's time from the subscriber's initial inquiry. The reports are based on information solicited from the business itself, the business' banking and credit sources, from trade suppliers, and from public records such as annual reports filed with the Secretary of State and reports of bankruptcy petitions.

On or about July 26, 1976, plaintiff's president met with a representative of its principal creditor, a bank, to discuss the possibility of future financing. During the meeting, the bank's representative informed plaintiff's president that he had just received a credit report issued by defendant indicating that plaintiff had recently filed a voluntary petition in bankruptcy. Plaintiff's president testified that he was both shocked and confused when confronted with the report, since plaintiff had never filed such a petition and, at the time the report was published, plaintiff's business was steadily expanding. In fact, plaintiff's president later testified that prior to the issuance of the credit report, plaintiff had never suffered a major economic reversal and its financial condition was sound. Nevertheless, despite the bank representative's trial testimony that he never really believed the report, the bank put off any future consideration of credit to plaintiff until the

discrepancy was cleared up. The bank later terminated plaintiff's credit allegedly for reasons unrelated to the report.

Plaintiff's president immediately contacted defendant's regional office in Manchester, New Hampshire. He explained the error to defendant's regional supervisor and requested, in addition to an immediate correction, a list of those creditors who had received the false reports in order that they might be reassured of plaintiff's solvency. Defendant's representative stated that the matter would be looked into, but refused to divulge to plaintiff's president the names of the creditors who had received the report.

The basis of the error was established at trial: a former employee of plaintiff, and not plaintiff, had filed a voluntary petition in bankruptcy. Defendant's employee, a seventeen year old high school student, paid $200 annually to review Vermont's bankruptcy petitions, had inadvertently attributed the former employee's bankruptcy petition to plaintiff itself, and reported the information as such to defendant. A representative of defendant testified that prior to the issuance of a credit report indicating a bankrupt business, it was defendant's routine practice first to check the report's accuracy with the business itself. No prepublication verification was ever attempted in the present case.

On or about August 3, 1976, having satisfied itself that its credit report on plaintiff was wrong, defendant issued a corrective notice to the five subscribers who had received the initial report. In substance, the corrective notice stated that it was a former employee of plaintiff, not plaintiff itself, who had filed the petition in bankruptcy, and that plaintiff "continued in busi-

ness as usual." Plaintiff informed defendant that it was dissatisfied with the corrective notice, since it implied that the initial mistake was attributable to plaintiff, not defendant. Plaintiff again demanded a list of subscribers who had seen the report, but its request was once again denied.

Thereafter, plaintiff refused to provide defendant with any further financial data, and requested that defendant inform anyone seeking such data that it was being withheld pending the outcome of plaintiff's defamation action against defendant. Instead, defendant issued plaintiff a "blank rating," indicating that plaintiff's circumstances were "difficult to classify" within defendant's rating system, and such information was distributed to those creditors who requested a current indication of plaintiff's financial status. A short while later, plaintiff commenced its defamation action.

## I.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that a "public official" was prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he [or she] proves that the statement was made with 'actual malice,' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80; *Burns v. Times Argus Association*, 139 Vt. 381, 384, 430 A.2d 773, 775 (1981). Three years later, the media protection established in *New York Times* was extended to cover defamatory falsehoods published about "public figures." *Curtis Publishing Company v. Butts*, 388 U.S. 130, 155 (1967). In *Gertz v. Robert Welch, Inc., supra*, the Supreme Court, in the last major pronunciation of protections afforded the media in defamation actions,

held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 347 (emphasis added). Although *Gertz* permitted a "private individual" to recover actual damages, presumed or punitive damages were not permitted absent proof of the *New York Times* standard "of knowledge of falsity or reckless disregard for the truth." *Id.* at 348.

The critical issue underlying the certified questions presented, a matter of first impression for this Court, is whether the First and Fourteenth Amendments to the United States Constitution require that the qualified protections afforded the media in "private" defamation actions, as set forth in *Gertz*, be extended to actions involving nonmedia defendants. Although the issue has never been decided by the United States Supreme Court, see *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979), it has been addressed in a number of state courts. See, e.g., *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Jacron Sales, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975). Since the basis of the trial court's decision to grant a new trial was its allegedly faulty jury instruction regarding the *Gertz* standards of liability and damages, a threshold determination as to *Gertz*'s applicability to the facts of this case is crucial.

In support of its claim that *Gertz*, as a matter of federal constitutional law, should apply to nonmedia as well as media defendants, defendant asserts that the former have equally compelling First Amendment

rights worthy of constitutional protection, and as such it questions the logic of affording the press exclusive immunity from the consequences of defamation. Additionally, defendant insists that distinctions between media and other information disseminating defendants are quite often illusory, and concludes that it should be considered a "publisher or broadcaster" for purposes of First Amendment protection.

We are fully aware that in certain instances the distinction between media and nonmedia defendants may be difficult to draw. However, no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services. As a result of a contractual arrangement between defendant and its subscribers, the procured information is to be kept confidential. There is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. We therefore reject, as have the majority of circuit courts, the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny. See, e.g., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir.), *cert. denied*, 415 U.S. 985 (1973); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1383 (7th Cir. 1972); *Kansas Elec. Supply Co., Inc. v. Dun & Bradstreet, Inc.*, 448 F.2d 647, 649 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971).

Moreover, in carefully surveying the decisions of those jurisdictions which have specifically addressed the issue of whether *Gertz* should be applied to nonmedia defendants, we note that the majority have refused such an extension. Although we are not bound by these decisions, their reasoning is both persuasive and compelling. In nonmedia defamation actions, "[t]he crucial elements . . . which brought the United States Supreme Court into the field of defamation law are missing. There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Harley Davidson Motorsports, Inc. v. Markley, supra*, 279 Or. at 366, 568 P.2d at 1363. Consequently, the Supreme Court of Oregon concluded:

> Because a private individual's right to recover for libel has been made more difficult in situations in which his interests have been at least partially outweighed by important constitutional values, it does not follow, for obvious reasons, that his recovery should be made more difficult in situations in which no such constitutional values are involved merely for the sake of securing symmetry of treatment of defendants. It is our conclusion that Gertz does not require application of the constitutional privilege to actions of defamation between private parties insofar as the issues raised here are concerned.

*Id.* at 370-71, 568 P.2d at 1365. For other cases holding *Gertz* inapplicable to nonmedia defamation actions, see generally *Denny v. Mertz, supra; Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981); *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980);

*Gengler v. Phelps*, 92 N.M. 465, 589 P.2d 1056 (1979); *Rowe v. Metz, supra; Retail Credit Company v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975); *cf. Jacron Sales Company, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975); Restatement (Second) Torts § 480B, Comment e.

In light of the above, we are convinced that the balance must be struck in favor of the private plaintiff defamed by a nonmedia defendant. "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues . . . ." *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 340 (quoting *New York Times v. Sullivan, supra*, 376 U.S. at 270). Accordingly, we hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

## II.

In the alternative, defendant contends that in the absence of a constitutional mandate, this Court should nevertheless adopt *Gertz* in the interests of fairness, simplicity and clarity in our state common law. Defendant's argument is based on the fear that without a heightened standard of protection in defamation actions, individuals will withdraw from, rather than pay the price of entry into, "the marketplace of ideas." Moreover, defendant insists that our common law, like the common law in the vast majority of other jurisdictions, see Prosser, Law of Torts, c. 19, § 115 (4th ed. 1971) and cases cited in 30 A.L.R. 2d 776 (1953), has already recognized, at least implicitly, a qualified common law privilege for credit reporting agencies. We disagree.

In *Nott v. Stoddard*, 38 Vt. 25 (1865), this Court recognized that there are certain exceptions to our general common law rule that malice will be presumed when words are in themselves defamatory and thus actionable per se:

> Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character. In such cases malice must be proved by extrinsic evidence, or inferred as a matter of fact by the jury from the circumstances.

*Id.* at 32. Although we have never *expressly* denied credit reporting agencies a qualified privilege, we have done so implicitly: "[I]f the words impute some quality, the natural tendency of which is to impair the plaintiff's professional or business character, as insolvency to a merchant, . . . they are actionable . . . ." *Darling v. Clement*, 69 Vt. 292, 300, 37 A. 779, 781 (1897) (citations omitted).

In balancing the equities between a credit reporting agency and the individual it has defamed through a false credit report, we note that "[a]n individual living in a world more and more dominated by large commercial entities is less able to bear the burden of the consequences of a false credit or character report than the agency in the business of selling these reports." *Retail Credit Company v. Russel, supra*, 234 Ga. at 770, 218 S.E.2d at 58. In light of the fact that our common law has never recognized a qualified privilege against defamation actions for credit reporting agencies, and given the absence of compelling policy reasons to do so now, we decline to adopt the rules set forth in *Gertz* as part of our common law.

## III.

With regard to the question of damages, we note that "the availability of both general and punitive damages in libel actions has not been rejected as a matter of constitutional law." *Michlin v. Roberts*, 132 Vt. 154, 163, 318 A.2d 163, 169 (1974). "When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation, but he is not required to rely solely upon the implications that are applicable and may present any evidence of competent character that is authorized by his pleadings, for the purpose of showing the extent of injury and the amount of the compensation that should be awarded." *Lancour v. Herald & Globe Association*, 112 Vt. 471, 475, 28 A.2d 396, 399 (1942) (citing *Nott v. Stoddard, supra*, 38 Vt. at 30).

Likewise, in accordance with this Court's belief that "[p]unitive damages are awarded to 'stamp the condemnation of the jury upon the acts of defendant on account of their malicious character,'" *Pezzano v. Bonneau*, 133 Vt. 88, 92, 329 A.2d 659, 661 (1974) (quoting *Goldsmith's Admr. v. Joy*, 61 Vt. 488, 500, 17 A. 1010, 1014 (1889)), their availability in defamation actions involving "malice" has never been questioned. *Lancour v. Herald & Globe Association, supra*, 112 Vt. at 478, 28 A.2d at 401 (citing *Smith v. Moore*, 74 Vt. 81, 86, 52 A. 320, 321 (1901)). Although each case stands upon its own facts, *Woodhouse v. Woodhouse*, 99 Vt. 91, 154, 130 A. 758, 788 (1925), we have indicated that "malice may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Shortle v. Central Vermont Public Service*

*Corporation*, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979) (citing *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921)); *Lancour v. Herald & Globe Association, supra*, 112 Vt. at 482, 28 A.2d at 402; *Woodhouse v. Woodhouse, supra*, 99 Vt. at 155, 130 A. at 788.

Since "punitive damages are incapable of precise determination, their assessment is 'largely discretionary with the jury,' " *Lanfranconi v. Tidewater Oil Company*, 376 F.2d 91, 96 (2nd Cir. 1967) (quoting *Gray v. Janicki*, 118 Vt. 49, 52, 99 A.2d 707, 709 (1953)), and said assessment will not be interfered with unless "manifestly and grossly excessive." *Pezzano v. Bonneau, supra*, 133 Vt. at 91, 329 A.2d at 661 (quoting *Gray v. Janicki, supra*, 118 Vt. at 52, 99 A.2d at 709). We have cautioned, however, that though "the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that it is the result of perverted judgment, accident or gross mistake." *Woodhouse v. Woodhouse, supra*, 99 Vt. at 157, 130 A. at 789.

## IV.

Guided by the rulings and principles outlined above, we turn to the certified questions raised by both parties regarding the propriety of the trial court's refusal to set aside the jury verdicts, V.R.C.P. 50, as well as its decision to grant a new trial on all issues. V.R.C.P. 59. As a basis for its motions, defendant argued that the verdicts were not supported by the evidence, in that the *Gertz* standards had not been met, that they were the product of passion and not reason, and that they were clearly excessive. In its order, the trial court noted that it had reviewed the jury instructions, all

memoranda submitted, the evidence of record, the verdict rendered by the jury and the applicable law. Persuaded that the evidence was "sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages," the trial court denied defendant's motions for judgment notwithstanding the verdict.

Defendant contends that the trial court abused its discretion in denying defendant's motions to set aside the verdicts. A careful review of the record discloses that defendant failed to renew, at the close of all the evidence, its earlier motions for a directed verdict on the issues of liability and compensatory damages. Thus, defendant's motions for judgment notwithstanding the verdict as to these two issues were properly denied. *Proctor Trust Company v. Upper Valley Press, Inc.*, 137 Vt. 346, 349, 405 A.2d 1221, 1223 (1979); *Palmissano v. Townsend*, 136 Vt. 372, 375, 392 A.2d 393, 395 (1978); *Houghton v. Leinwohl*, 135 Vt. 380, 381-82, 376 A.2d 733, 735-36 (1977); V.R.C.P. 50(b).

In determining whether the trial court abused its discretion by refusing to set aside the punitive damages award on the grounds that it was excessive, this Court is "bound to indulge every reasonable presumption in favor of the ruling below, bearing in mind that the trial court was in a better position to determine the question." *Towle v. St. Albans Publishing Company, Inc.*, 122 Vt. 134, 142, 165 A.2d 363, 368 (1960) (citing *Lancour v. Herald & Globe Association, supra*, 112 Vt. at 483, 28 A.2d at 403). In short, defendant must show that the ruling is clearly untenable and without any reasonable basis of support in the record. *Id.* (citing *Stone v. Briggs*, 112 Vt. 410, 415, 26 A.2d

828, 831 (1942)); *Dashnow v. Myers*, 121 Vt. 273, 279, 155 A.2d 859, 864 (1959).

We are not persuaded that the trial court abused its discretion in denying defendant's motion to set aside the verdict as to the issue of punitive damages.[1] There was ample evidence in the record to enable the jury to conclude that defendant's conduct was insulting, reckless, and in total disregard of plaintiff's rights. *Shortle v. Central Vermont Public Service Corporation*, *supra*, 137 Vt. at 33, 399 A.2d at 518. As noted above, "the size of the verdict alone does not indicate passion or prejudice by the jury." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (citing *Gray v. Janicki*, *supra*, 118 Vt. at 51, 99 A.2d at 709). We are not convinced that the trial court abused its discretion in denying defendant's motions for judgment notwithstanding the verdict on the issue of punitive damages. Accordingly, the fourth certified question for review, whether the trial court erred in denying all motions of defendant for judgment notwithstanding the verdict, is answered in the negative.

In the second part of its order, the trial court, persuaded that its jury instructions "permitted the jury to believe that damages could be awarded to the [p]laintiff for defamation absent proof of damages and absent a showing of a knowledge of falsity or reckless

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[1] In its brief, defendant contends for the first time on appeal that in the absence of evidence of corporate involvement, punitive damages may not be assessed. "[W]e have repeatedly held that issues not raised below, even those having a constitutional dimension, will not be considered when presented for the first time on appeal." *State v. Patnaude*, 140 Vt. 361, 368, 438 A.2d 402, 404 (1981) (citing *State v. Prue*, 138 Vt. 331, 331-32, 415 A.2d 234, 234 (1980)).

disregard for the truth by the [d]efendant," granted defendant's motion for new trial on all issues. That is, defendant's motion for new trial was granted on the basis of the trial court's belief that its charge to the jury, insofar as it related to the *Gertz* standards of liability, was confusing. In view of the fact that our decision today holds *Gertz* totally inapplicable to the present case, we find the error harmless. In fact, we have carefully reviewed the jury instructions, and in addition to being properly charged in line with our common law rules as to liability and damages, defendant was afforded a common law qualified privilege against credit report agencies along with the ill-charged constitutional privilege outlined in *Gertz*. In short, defendant has nothing to complain about, since it received two beneficial charges to which it was not entitled.

*Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.*

FOR THE COURT:

WILLIAM C. HILL
Associate Justice